

**Security Council**

Distr.: General
14 August 2015

Original: English

Letter dated 13 August 2015 from the Secretary-General to the President of the Security Council

In accordance with article 17, paragraph 3, of the Relationship Agreement between the United Nations and the International Criminal Court, I have the honour to convey the attached communication dated 29 June 2015 from the President of the Court, Judge Silvia Fernández de Gurmendi (see annex).

The President transmits therewith the decision on the Prosecutor's request for a finding of non-compliance against the Republic of the Sudan, issued by Pre-Trial Chamber II of the International Criminal Court on 26 June 2015, in the case of the *Prosecutor v. Abdel Raheem Muhammad Hussein*.

I should be most grateful if you would bring the present letter and its annex to the attention of the members of the Security Council.

(Signed) **BAN** Ki-moon



Annex

Letter dated 29 June 2015 from the President of the International Criminal Court addressed to the Secretary-General

[Original: English and French]

Pursuant to article 17 (3) of the Relationship Agreement between the United Nations and the International Criminal Court, and in accordance with article 87 (7) of the Rome Statute and regulation 109 (4) of the Regulations of the Court, and as requested by Pre-Trial Chamber II, I hereby transmit the decision on the Prosecutor's request for a finding of non-compliance against the Republic of the Sudan of the Chamber, dated 26 June 2015 (see enclosure).

I would be grateful if you could transmit the present letter and its enclosure to the Security Council.

(Signed) Silvia **Fernández de Gurmendi**

Enclosure

[Original: English and French]

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Cour
Pénale
Internationale

International
Criminal
Court



No. ICC-02/05-01/12
Date: 26 June 2015

PRE-TRIAL CHAMBER II

Before: Judge Cuno Tarfusser, Presiding Judge
Judge Marc Ferrin de Brichambaut
Judge Chang-ho Chung

SITUATION IN DARFUR, SUDAN

THE PROSECUTOR V. ABDEL RAHEEM MUHAMMAD HUSSEIN

Public

Decision on the Prosecutor's Request for a finding of non-compliance against the
Republic of the Sudan



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26 June 2015

Document to be notified, in accordance with regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor Fatu Bersouda, Prosecutor James Stewart, Deputy Prosecutor	Counsel for the Defence
Legal Representatives of Victims	Legal Representatives of Applicants
Unrepresented Victims	Unrepresented Applicants for Participation/Reparation
The Office of Public Counsel for Victims	The Office of Public Counsel for the Defence
States Representatives Competent authorities of the Republic of Sudan	Others Presidency Bureau of the Assembly of States Parties

REGISTRY

Registrar Herman von Hebel	Deputy Registrar
Victims and Witnesses Unit	Detention Section
Victims Participation and Reparations Section	Others

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Pre-Trial Chamber II (the "Chamber") of the International Criminal Court (the "Court" or the "ICC") issues this decision on the "Prosecution's request for a finding of non-compliance against the Republic of the Sudan in the case of *The Prosecutor v Abdel Raheem Muhammad Hussein*, pursuant to article 87(7) of the Rome Statute" (the "Prosecutor's Request" or "Application").¹

I. PROCEDURAL HISTORY

1. On 31 March 2005, the Security Council (the "SC" or the "Council") acting under Chapter VII of the Charter of the United Nations (the "UN") adopted Resolution 1593(2005), referring the situation in Darfur, Sudan to the Court.²
2. On 1 March 2012, Pre-Trial Chamber I ("PTC I") issued a warrant of arrest against Abdel Raheem Muhammad Hussein ("Hussein") for seven counts of crimes against humanity and six counts of war crimes.³
3. On 13 March 2012, the Registry informed PTC I that the warrant and the requests for arrest and surrender of Hussein had been transmitted to Sudan, all states parties and the members of the UNSC⁴, calling for their cooperation pursuant to, *inter alia*, articles 89(1) and 91 of the Rome Statute (the "Statute").
4. This warrant of arrest remains to be executed.

II. APPLICABLE LAW

5. The Chamber notes articles 21(1)(a) and (b), 86, 87(7) 89 and 97 of the Statute, rule 195(1) of the Rules of Procedure and Evidence (the "Rules"), regulation

¹ ICC-02/05-01/12-32

² S/RES/1593 (2005).

³ ICC-02/05-01/12-2.

⁴ ICC-02/05-01/12-4; ICC-02/05-01/12-5; ICC-02/05-01/12-6.

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109(2), (3) and (4) of the Regulations of the Court (the "Regulations") and article 17(3) of the Negotiated Relationship Agreement between the ICC and the UN (the "Relationship Agreement").

III. DETERMINATION BY THE CHAMBER

6. Hussein was, at the time of the issuance of the warrant and until early June 2015, the Minister of Defence of the Republic of Sudan, a key minister in the cabinet of President Omar al-Bashir. To this day, following his recent appointment as Governor of Khartoum, he continues to hold public office and remains a high-profile official in Sudan. The issuance of the warrant of arrest has had no impact either on his senior position within the Sudanese administration or on his willingness and ability to travel beyond Sudanese borders, including on behalf of Omar Al-Bashir. On three occasions, upon receiving notification of Hussein's imminent travel to Chad⁸, Central African Republic⁹ and South Sudan¹⁰, PTC I issued decisions¹¹ reminding those States of their outstanding obligation to implement UNSC Resolution by arresting Hussein and instructing the Registrar to prepare and transmit requests for arrest and surrender when necessary. Those decisions and requests were issued to no avail: in all instances, as related in the reports submitted by the Registrar¹², Hussein was able to complete his travels unhindered.

7. Sudan's failure to arrest Hussein is only one instance of its by now long history of determined and consistent failure to comply with UNSC Resolution

⁸ ICC-02/05-01/12-11.

⁹ ICC-02/05-01/12-13.

¹⁰ ICC-02/05-01/12-22-Conf.

¹¹ ICC-02/05-01/12-12; ICC-02/05-01/12-14; ICC-02/05-01/12-16; ICC-02/05-01/12-20; ICC-02/05-01/12-21; ICC-02/05-01/12-23-Conf.

¹² ICC-02/05-01/12-15 (Chad); ICC-02/05-01/12-18-Conf (Chad); ICC-02/05-01/12-19-Conf (Chad); ICC-02/05-01/12-17 (CAR); ICC-02/05-01/12-25-Conf (South Sudan).



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1593. This failure dates back to the first warrants of arrest issued in the situation in Darfur, has emerged as a constant feature ever since, and has found its most controversial expression in its persistent refusal to surrender President Al-Bashir.

8. The Chamber recalls that, as early as 25 May 2010, PTC I issued the "Decision Informing the United Nations Security Council about the lack of cooperation by the Republic of the Sudan" in the context of the case of the *Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman*.¹⁰ As recently as 9 March 2015, Sudan's repeated refusal to arrest and surrender its most senior suspect led the Chamber (acting upon a request by the Prosecutor) to issue a finding of non-cooperation of Sudan and to transmit it to the UN Security Council for the adoption of appropriate measures¹¹.

9. Since the adoption of UNSC Resolution 1593, Sudan has made it clear that it would not surrender any of its nationals to the jurisdiction of the Court. Particularly significant in this respect appears a statement by the Sudanese presidential assistant quoted by the Prosecutor in the context of the Office's ninth report to the SC on 5 June 2009, pursuant to resolution 1593(2005), to the effect that "[n]o Sudanese, not Al-Bashir and not a non-Al-Bashir, will appear before the [Court], and we will not even send a lawyer to represent us there". Since the issue of the warrant of arrest, the country's unwillingness to submit to the jurisdiction of the Court has been repeatedly reiterated by senior Sudanese officials. On 5 June 2013, in an assertion which stands out for its resolute tone, the Sudanese representative stated before the Security Council that the "Prosecutor's demand that [the Sudanese government] implement the arrest warrants issued against [Omar Al Bashir] and other Sudanese officials is unacceptable because i.

¹⁰ Pre-Trial Chamber I, ICC-02/05-01/02-57.

¹¹ ICC-02/05-01/02-127.



is based on faulty logic" and "[w]hat is based on wrong is of necessity wrong itself".¹² The lack of cooperation by Sudan in respect of all suspects in the situation, including Hussein, has been repeatedly exposed by the Prosecutor's reports submitted to the Security Council pursuant to resolution 1593, most recently on 15 December 2014¹³. Representatives of Sudan have refused to receive documents emanating from the Court relating to the execution of the warrant, including the request for Hussein's arrest and surrender¹⁴.

10. Finally, the extent of Sudan's determination to systematically evade the obligations stemming from UNSC Resolution 1593 emerged most prominently on the recent occasion of the African Union summit held in South Africa on 13 and 14 June 2015.

11. Against this scenario, which has already prompted the ICC Prosecutor to denounce Sudan's "consistent pattern of non-cooperation" in front of the Security Council¹⁵, a renewed sense of urgency demands that the Court does not remain silent or inane. The Court has heard from Sudanese representatives that the country's position vis-à-vis the Court "will not change"¹⁶.

12. The Chamber wishes to reiterate that, whilst only States Parties to the Statute are under an obligation to cooperate with the Court, a resolution adopted by the Security Council acting under Chapter VII of the UN Charter creates an obligation to cooperate with the Court on those UN Member States which are not parties to the Statute. As a UN member since 12 November 1956, Sudan is bound

¹² S/PV.6976, <http://www.un.org/News/Press/docs/2015/06/20150626.unsc.pv6976.html>, page 17.

¹³ Twentieth report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1593(2005), paragraph 28.

¹⁴ ICC-02/05-01/12-10-US-Exp, paragraph 5 and Annex 1 thereto.

¹⁵ Nineteenth report of the prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1593(2005), 23 June 2014, paragraph 8.

¹⁶ ICC-02/05-01/09-113 Conf-Exp-Arx2; also ICC-02/05-01/09-113 Conf-Exp, para. 8.



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by the terms of the UN Charter, including its article 25 according to which "[m]embers of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the [...] Charter". As stated by the International Court of Justice in its advisory opinion on *Namibia*, "when the Security Council adopts a decision under article 25 in accordance with the Charter, it is for member States to comply with that decision [...]. To hold otherwise would be to deprive this principal organ of its essential functions and powers under the Charter".¹⁷

13. The SC adopted resolution 1593(2005), in which it was *decided* that the "Government of Sudan [...] shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution".¹⁸ The legal effect of this resolution is twofold. First, Part 9 of the Statute and the relevant Rules governing State Party cooperation become applicable vis-à-vis Sudan. Second, Sudan is expected to provide the necessary cooperation envisaged in said resolution including the implementation of the requests calling for the arrest and surrender of Hussein in accordance with the Court's cooperation regime set out in Part 9 and its national laws. Only in the event that Sudan should face any legal impediment to comply with these requests, the Sudanese authorities should consult or notify the Court in accordance with article 97 of the Statute and rule 195 of the Rules.

14. In view of the foregoing, the Chamber considers that Sudan not only disregarded the Request for cooperation to arrest and surrender Hussein, pursuant to articles 86 and 89 of the Statute, but also SC Resolution 1593(2005). It

¹⁷ ICJ, "Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1973)", Advisory Opinion, 21 June 1971, para. 116.

¹⁸ SC Res 1593(2005), para. 2.



also failed to discharge its obligations to consult or notify the Court of any impediment to execute the pending requests. This course of action calls upon the SC to take the necessary measures they deem appropriate.

15. It is well-known that, unlike domestic courts, the ICC has no direct enforcement mechanism in the sense that it lacks a police force of its own. As such, the ICC relies mainly on the States' cooperation, without which it cannot fulfil its mandate. When the SC, acting under Chapter VII of the UN Charter, refers the situation in Darfur, Sudan to the Court as constituting a threat to international peace and security, it might be expected that the Council might also consider deciding on a follow-up.

16. Having stated the above, the Chamber recalls article 87(7) of the Statute according to which, "[w]here a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute [...] the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council".

17. Under the present circumstances, regulation 109(3) of the Regulations, dictating that the "Chamber shall hear [first] from the requested State", is no obstacle to the making of such finding at this stage. As already noted in the decision on the failure to cooperate in the Bashir case, Sudan has constantly refused to engage in any sort of dialogue with the responsible organs of the Court, as of 2009 and for over six years. As such, the Chamber considers that Sudan has waived its right to be heard on the matter. Accordingly, it shall now proceed to the next step regarding Sudan's non-cooperation with the Court and refer the matter to the SC for the Council to take appropriate measures. The

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Chamber deems it appropriate to also notify the competent authorities of Sudan, the Prosecutor, the participants in relation to the present case, as well as the Assembly of States Parties to the Statute, of this decision for their information.

FOR THESE REASONS, THE CHAMBER HEREBY

a) finds that the Republic of Sudan: (1) has failed to cooperate with the Court by deliberately refusing to liaise with the relevant organs of the Court and execute the pending requests for the arrest and surrender of Hussein, thus preventing the Court from exercising its functions and powers under the Statute; and (2) has failed to consult the Court in accordance with article 97 of the Statute and rule 193(1) of the Rules on any problem(s) which could have impeded the execution of the requests for arrest and surrender of Hussein, or to bring to the attention of the Court relevant information which would have assisted it in deciding on any such problem; and

b) refers, in accordance with regulation 109(4) of the Regulations, the present decision to the President of the Court for transmission to the Security Council, through the Secretary General of the United Nations, pursuant to article 17(3) of the Relationship Agreement.

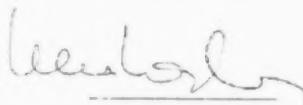
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Done in both English and French, the English version being authoritative



Judge Cuno Tarfusser
Presiding Judge



Judge Marc Perrin de Brichambaut



Judge Chang-ho Chung

Dated this Friday, 26 June 2015

At The Hague, The Netherlands



Cour
Pénale
Internationale
International
Criminal
Court

Name: Elisabeth Rouland Smith

Certifies document

To: ICC-02/05-01/12-33

the Decision on the Prosecutor's Request for
issuance of non-compliance against the
Republic of the Sudan

on: 2 July, 2015 at The Hague

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